SYARIKAT UNIWELD TRADING

v.

ASIA INSURANCE CO. LTD.

HIGH COURT MALAYA JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 11-65-1990]
22 MARCH 1996

INSURANCE LAW: *Indemnity claim by insured - Insurer denying liability - Proposal form filled by agent - Whether agent acted as agent of the insurer or insured - Whether knowledge of the agent can be imputed to the insurer - Whether insured's loss excluded by exception clause - Ambiguity between the indemnity clause and exception clause - Whether contra proferentum rule applicable - Consideration of ss. 18E & 44A of the Insurance Act 1963.*

CIVIL PROCEDURE: *Insurance claim - Appeal - Arbitration clause in insurance policy - Whether insured precluded from proceeding with present action - No reference to arbitration by either party pursuant to s. 6 Arbitration Act 1952 - Whether Court should exercise its discretion to order a stay of proceedings pending arbitration.*

The appellant was the proprietor of a workshop, Syarikat Uniweld Trading, which was engaged in the repair and welding of motor vehicles. He was persuaded to insure his workshop by the respondent's agent and as he was not conversant in the English language the necesarry forms were filled by the agent. Subsequently, an insurance policy was issued to the appellant in the workshop's name. On 28 January 1988, while the policy was in effect, a fire broke out and completely destroyed a customer's (Liaw) motorcar due to an accidental leak of a gas pipe. The appellant compensated his customer and sought for indemnity from the respondent.

The respondent denied liability under the exception clause of the policy, which excluded coverage for fire. Notwithstanding, the indemnity clause in the Schedule of the policy stated that any damage to property belonging to a third party which arose from the negligence of the appellant's servant whilst engaged in the workshop was to be indemnified by the respondent. The matter was tried before the learned Magistrate who found in favour of the respondent and the appellant appealed. The questions raised were in relation to the role of the agent, whether the appellant's loss was excluded by the exception clause in the policy and whether the appellant's action was barred by the arbitration clause in the policy.

Held:

[1] The agent and the manager both knew that from the nature of the business undertaken by the appellant there was a possibility that the workshop might catch fire. It was with this knowledge that the manager accepted the appellant's form and thereafter issued the cover note. Therefore, from the available evidence and by virtue of s. 44A of the Insurance Act 1963, the agent in the present appeal was the authorised agent of the respondent insurer and any knowledge that the agent possessed was deemed to be the knowledge of the respondent insurer.

[2] The negligence of the appellant insured's employee was the proximate cause of the fire that totally destroyed Liaw's car, the innocent third party. The appellant insured intended to insure his workshop from the hazards of fire and this was known to the agent. If there was an ambiguity as to whether the negligence that was referred to in the indemnity clause must necessarily extend to fire as the appellant insured must have thought then the *contra proferentum* rule must be vigorously applied against the respondent insurer.

[3] The issue of agency and the implications of s. 44A of the Insurance Act 1963 are matters outside the purview of the arbitrators. These are matters that should best be resolved by the Courts and not the arbitrators and, consequently, the Court concludes that good grounds exist not to submit the dispute between the parties to arbitration and notwithstanding the arbitration clause, the appellant was entitled to institute his action in the Magistrate's Court.

Per Curiam:

In construing s. 44A of the Insurance Act 1963, it must be held that an authorised agent of the insurer who solicits or negotiates a contract of insurance in such capacity must be given a wide scope of jurisdiction so as to cover not only explicit and expressed authority but also apparent or ostensible authority. Thus, if the insured allows an authorised agent to fill the proposal form for him, and the insured gives the correct answers but the answers were falsely written down by the agent, then the agent remains throughout as the agent of the insurer. This interpretation is in accordance with the accepted canon of construction that a commercial document, like an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that the provisions of the insurance policy receive a fair and sensible application. But if the insured allows or requests the authorised agent to fill the proposal form for him and gives permission, whether oral or in writing, to the agent to cough up with the answers to not only some but all the questions in the proposal form, the insured shall be deemed to have acquiesced in the falsification of the anwers if he signs the proposal form.

This is then said to be collusion or connivance between the authorised agent and the insured as envisaged in s. 44A(3)(a) of the Insurance Act 1963.

[Appeal allowed with costs]

Cases referred to:

Wooding v. Monmouthshire Indemnity Society Ltd. [1939] 4 All ER 570 ***(refd)***
Re Yager & The Guardian Assurances Co. Ltd. [1912] 108 LT 38 ***(refd)***
Canning v. Farquhar [1886] 16 QBD 727 ***(refd)***
Harrington v. Pearl Life Assurance Co. Ltd. [1914] 30 TLR 613 ***(refd)***
J. Martin of London Ltd. v. Russel [1960] 1 Lloyd's Rep. 554 ***(refd)***
Lowenstein v. Poplar Motor Transport Ltd. [1968] 2 Lloyd's Rep. 233 ***(refd)***
M. Cowan v. Baine & Johnson [1891] AC 401 ***(refd)***
Re Etherington and the Lancashire and Yorkshire Accident Ins. Co. [1909] 1 KB 591 ***(refd)***
Westminster Fire Office v. Reliance Marine Insurance Co. [1903] 19 TLR 668 ***(refd)***
Fraser v. Furman [1967] 1 WLR 989 ***(refd)***
Cornish v. Accident Ins. Co. [1889] 23 QBD 453 ***(refd)***
Kearney v. General Accident Fire and Life Assurance Corp. Ltd. [1968] 2 Lloyd's Rep. 240 ***(refd)***
L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. [1974] AC 235 ***(refd)***
Newsholme Brothers v. Road Transport And General Insurance Company, Limited [1929] 2 KB 356 ***(dist)***
Bawden v. London Edinburgh & Glasgow Assurance Co. [1892] 2 QB 534 CA ***(dist)***
Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29 ***(foll)***
Kandasami v. Mohamed Mustafa [1983] 2 MLJ 85 ***(refd)***
Central Lorry Service Co. Sdn. Bhd. v. The American Insurance Co. [1981] 2 MLJ 40 ***(foll)***
Vaughan v. Menlove [1837] 3 Bing. NC 468 ***(refd)***
Filliter v. Phippard [1847] 11 QB 347 ***(refd)***
Lochgelly Iron and Coal Co. v. M'Mullan [1934] AC 1 ***(refd)***
Ridell v. Reid [1943] AC 1 ***(refd)***
Chan Woon-Hung (trading as Ocean Plastic Factory) v. Associated Bankers Insurance Co. Ltd. [1993] 2 HKLR 127 ***(not foll)***
United Malayan Insurance Co. Ltd. v. Lee Yoon Heng [1964] MLJ 453 ***(refd)***
Wong Lang Hung v. National Employees' Mutual General Insurance Association Ltd. [1972] 2 MLJ 191 ***(refd)***
China Insurance Co. Ltd. v. Ngan Ah Kau [1972] 1 MLJ 52 ***(refd)***
Tan Kang Hwa v. Safety Insurance Co. [1973] 1 MLJ 6 ***(refd)***
National Insurance Co. Ltd. v. S. Joseph [1973] 2 MLJ 196 ***(refd)***
Ong Eng Chai v. China Insurance Co. Ltd. [1974] 1 MLJ 82 ***(refd)***
Hydarnes v. Indemnity Mutual [1895] 1 QB 500 ***(refd)***
Willesford v. Watson [1873] 7 LR 473 ***(refd)***
Thiagarajah Pooinpatarasan v. Shanmugam Paramsothey & Others [1990] 2 CLJ 312 ***(refd)***
"Dong Moon" Trans Asia Shipping Co. Ltd. v. "Dong Moon" downers & Ors. [1879] 1 MLJ 152 ***(refd)***
Allagappa Chettiar v. Palanivel Pillai & Ors. [1967] 1 MLJ 209 ***(refd)***

Lan You Timber Co. v. United General Insurance Co. Ltd. [1968] 1 MLJ 181 ***(refd)***
Government Officers Cooperative Housing Sosiety Ltd. v. United Asia Investment Ltd. & Ors. [1972] 1 MLJ 113 ***(refd)***
Lai Siew Wah Sdn. Bhd. v. Ng Chin [1988] 1 MLJ 393 ***(refd)***

Legislation referred to:
Insurance Act 1963, ss. 18E, 44A
Arbitration Act 1952, s. 6

For the appellant - Brian Komathi; M/s. Brian Komathi & Partners
For the respondent - Wong Heng Khong; M/s. H.K. Wong & Partners

JUDGMENT

Abdul Malik Ishak J:

The facts which gave rise to the present appeal may be briefly stated thus. The appellant is Ng Kong Kong and he runs a workshop styled Syarikat Uniweld Trading. That workshop was engaged, at the material time, in repairing and welding motor vehicles. Since Ng Kong Kong is the owner of Syarikat Uniweld Trading, for the purpose of this appeal any reference to the appellant must necessarily refer to Ng Kong Kong. Now, one day the respondent's agent went to see the appellant at the workshop and managed to convince the appellant to take insurance for the workshop with the respondent. There was evidence that the appellant was not conversant with the English language and, consequently, the agent filled the form for the appellant. In due course, a policy of insurance vide no: 80-462717-88 dated 5 October 1988 was issued to the appellant in the workshop's name. During the currency of the insurance policy, to be precise on 28 January 1989 at about 11.30 a.m., while the appellant's servant was engaged in repairing a motorcar bearing registration no: JE 46 belonging to one Liaw Khoon Liang ("Liaw"), a fire broke out and destroyed the motorcar completely as a result of an accidental leakage of a gasoline gas pipe. The appellant compensated Liaw in the sum of RM9,000 for the total wreck of the motorcar and sought indemnity from the respondent. Since the respondent refused to indemnify the appellant the matter went for trial before the learned Magistrate, Magistrate's Court, Johor Bahru. The learned Magistrate gave judgment for the respondent, and hence this appeal.

Only two issues were canvassed before me, namely:

(1) Whether the appellant's loss was excluded by the exception clause in the insurance policy?

(2) Whether the arbitration clause in the insurance policy barred the appellant from instituting the action against the respondent?

The first issue

It is germane, at this juncture, to look into the exception clause relevant to the present appeal. For this, I need to quote in extenso the relevant portions of the insurance policy and it is set out in printed form as follows:

Exceptions

Unless otherwise specially stated herein or endorsed hereon the indemnity expressed in this Policy shall not apply to or include:

(4) Liability in respect of injury or damage caused by or in connection with or arising from:

(b) Fire earthquake explosion flood fumes or water pollution.

The indemnity expressed in the insurance policy is clearly set out in the Schedule thereto and it is worded in printed form as follows:

The Indemnity: The Company will indemnify the insured in respect of:

A. All sums which the insured shall become legally liable to pay for compensation in respect of.

Immediately below this, the following words are typed therein:

Accidental personal bodily injury to third parties and accidental damage to property belonging to third parties caused by:

(a) the fault or negligence of the insured and/or any person in the insured's service whilst engaged in the insured's business as above described.

(b) any defect in the ways, works, machinery, plant or premises of the Insured at the business premises address.

Two things must be highlighted here. Firstly, the premium was paid by the appellant as confirmed by the agent in examination-in-chief. Secondly, the insurance policy has been issued to the appellant and, consequently, there was a binding contract of insurance between the appellant and the respondent. But, one must not forget that there is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued: *Wooding v. Monmouthshire Indemnity Society Ltd.* [1939] 4 All ER 570, 581 and *Re Yager and The Guardian Assurances Co. Ltd.* [1912] 108 LT 38, 44. What is important is to see whether the terms of the insurance have been agreed upon by the parties and if that has been achieved then there is a *prima facie* binding contract of insurance, and the insured is obliged to pay a premium as agreed, while the insurer must deliver a policy containing the agreed terms. The respondent here as a responsible insurer negotiated on what I term as a commercially sensible basis when they incorporated a condition that the insurance shall not commence until the

premium has been actually paid to and accepted by the respondent and further until the respondent's official letter or policy has been issued: see condition 1 of the insurance policy and two cases on the subject matter, namely: *Canning v. Farquhar* [1886] 16 QBD 727 and *Harrington v. Pearl Life Assurance Co. Ltd.* [1914] 30 TLR 613.

Now, having found that there was indeed a valid and subsisting contract of insurance between the appellant and the respondent, the next step to consider would be the role of the agent in securing the policy for the respondent. From the available evidence, it was the agent that approached the appellant to secure an insurance policy for the respondent. The agent acted for the respondent and the agent visited the workshop and saw what was the business conducted by the appellant. The agent testified that he filled the form with care and wrote the type of business undertaken by the appellant. Indeed the schedule to the insurance policy clearly mentioned the appellant's business to be "Selling, Fixing and Welding Exhaust, Windscreen and Radiator." The agent knew that there was a possibility that the workshop might catch fire. The agent was told by the appellant that the purpose of the insurance coverage was to protect owners of motor vehicles who sent their motor vehicles to the workshop from losses. Liaw's car was sent to the workshop to have its exhaust repaired. It is common knowledge that to fix an exhaust or to repair an exhaust to the undercarriage of a motorcar, welding must be done.

Welding involves a risk of fire to the workshop and damage to property of Liaw, the third party, and the agent must have known about this when he filled the form on behalf of the appellant who was, to all intents and purposes, unable to understand the English language. The form was in the English language and so were the insurance policy. It is not wrong to say that in the Malaysian context, Malaysians generally when approached by an insurance agent would regard that agent as an agent of the insurer. The Malaysian public would expect the insurance agents to fill the forms for them and, consequently, would be under an impression that the insurance agents have an express authority to complete the contract on behalf of the insurers. It is for this reason that an insurance policy, like the one before me now, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application: *J. Martin of London Ltd. v. Russell* [1960] 1 Lloyd's Rep. 554, 565; *Lowenstein v. Poplar Motor Transport Ltd.* [1968] 2 Lloyd's Rep. 233, 238. The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result as envisaged in *M'Cowan v. Baine & Johnson* [1891] AC 401, 403; *Re Etherington and the Lancashire and Yorkshire Accident Ins. Co.* [1909] 1 KB 591, 597; and *Westminster Fire Office v. Reliance Marine Insurance Co.* [1903] 19 TLR 668. An unanticipated result in the context of the present appeal would be to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy. Thus, in an insurance policy where the

main purpose was to insure against damages arising from negligent acts by the insured, it was held that a condition that "the insured shall take reasonable precautions" could not be so construed that every negligent act was a breach of it *(Fraser v. Furman* [1967] 1 WLR 989; and *Cornish v. Accident Ins. Co.* [1889] 23 QBD 453). It is not out of place to mention that in interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole (*Kearney v. General Accident Fire and Life Assurance Corp. Ltd.* [1968] 2 Lloyd's Rep. 240; and *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1974) AC 235, 251, 265). In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording can be resolved.

It was submitted by Counsel for the respondent that whatever knowledge the agent has in regard to the workshop that knowledge cannot be imputed to the insurer. Reliance was placed on the authority of *Newsholme Brothers v. Road Transport And General Insurance Company, Limited* [1929] 2 KB 356 for that proposition. The facts in *Newsholme* were that a proposal form for the insurance of a motor-bus was signed by the person wishing to effect the insurance, but the answers to the questions therein, which were warranted to be true and to form the basis of the contract, were filled in by the insurance company's agent who, although told the true facts, wrote, for some unexplained reason, answers which were untrue in a material respect. The agent was not authorized by the insurance company to fill in proposal forms, and it did not appear that the company knew that he had in fact done so. His duties were to procure persons to effect insurances and to see, as far as he could, that proposal forms were correctly filled up; he was not authorized to give a cover note or to enter into a policy of insurance. A policy was issued to the person who had signed the proposal form, and during its currency he made a claim under it, but the insurance company repudiated liability on the ground of the untrue statements in the proposal form. It was held by the Court of Appeal that the agent of the insurance company in filling in the proposal form was merely the amanuensis of the proposer, that the knowledge of the true facts by the agent could not be imputed to the insurance company, and therefore the insurance company was entitled to repudiate liability on the ground of the untrue statements in the proposal form.

It is interesting to note that Rowlatt J who heard the case of *Newsholme* at the Court of First instance held that Willey was the agent of the applicants in filling up the proposal, and that the arbitrator was wrong when he held that Willey's knowledge was the knowledge of the respondents. He accordingly held that as the answers written on the proposal form were incorrect in a material respect the respondents were not liable under the policy. The applicants appealed. Out of the three Judges of the Court of Appeal that heard the appeal,

two of them wrote separate judgments with one writing a short concurring judgment. To be precise, both Scrutton LJ and Greer LJ, wrote fairly long judgments with Russell LJ, writing that short concurring judgment.

Now, Scrutton LJ began his judgment in *Newsholme* by adopting the stand that (at page 362):

> The contract of insurance requires the utmost good faith; the insurer knows nothing, the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk.

Further down the same page of the same case, Scrutton LJ said:

> The proposal form contains a promise, a warranty, that the truth of the proposer's answers shall be the basis of the contract, and is signed by the proposer. It is inevitable in such a course of business that the agent employed to get proposals will sometimes fill in or assist in filling in the answers on the form, and if they are inaccurate, the proposer, though he has signed the promise that those answers are true, alleges that the fault is that of the agent of the insurance company who filled in the answers, and claims, not that he can rescind the contract, but that he can rely on it without being prejudiced by the inaccuracy of the answers he has signed as true. There then comes a conflict, which is visible in the authorities cited to us, between the desire to hold the insurer, who employs an agent to bring him business, liable for anything that agent does in procuring business, and, on the other hand, the contention that a man who signs a promise that certain written statements are true and the basis of his contract, which statements, if he read them before signing, he would know to be untrue, cannot claim to vary his conduct by omitting that promise and misstatement. The insurance companies also run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them.

Even though Willey, the insurance agent, was told the true facts by *Newsholme* but Willey wrote down the untrue facts in the proposal form, yet Scrutton LJ held that Willey was the agent of *Newsholme* and, consequently, as *Newsholme* had signed the proposal he must be taken to have promised the truth of what he signed. This was how Scrutton LJ put it (see page 364):

> The arbitrator finds that the answers were in the handwriting of Willey, the insurance agent, and that *Newsholme* apparently left the matter entirely in the hands of Willey. He finds that Willey was told the true facts by *Newsholme*, and that the reason for his not writing down the true facts did not appear. It must either (1) that he unintentionally wrote untruths, because (a) he did not understand *Newsholme's* communication to him, or (b) forgot what he was told, or (c) did not understand the questions asked, or (2) that he intentionally wrote down untrue facts to earn his commission. Whichever alternative is the truth, Willey was writing the answers as the amanuensis of *Newsholme*, whose answers they were to be; and after Willey had written the answers, *Newsholme* signed the proposal, and must be taken to have promised the truth of what he signed. I do not understand how in receiving the information as to the answers and in

writing those answers, Willey can be taken to be anything else than the agent of the person whose answers they are to be, and he must be taken to have written them and promised they were true. I can understand a contention that *Newsholme* was induced to sign by the representation of Willey, that these answers were what the insurance company required, though such a contention would be difficult to sustain in view of *Newsholme's* knowledge that the answers were untrue; but the result of such a contention, if sustained, would be rescission of the contract, not its enforcement with the omission of the untrue answers.

Scrutton LJ rejected Lord Esher MR's decision in *Bawden v. London Edinburgh and Glasgow Assurance Co.* [1892] 2 QB 534 CA when his Lordship wrote the decision in *Newsholme*. Lord Esher MR in *Bawden's* case held the view that the agent was the agent of the insurer and the knowledge that the agent possessed was deemed to be the knowledge of the company. The facts in *Bawden's* case were as follows: *Bawden* was an illiterate man, almost unable to read or write, but able to write his name. He had only one eye. Quin was a local agent of the insurance company. No evidence was given as to the extent of his authority, but the Court "gathered from what he did" that he had no authority to make contracts, but that he had authority to negotiate and settle the form of the assured's proposal for insurance, and he was supplied with forms for that purpose. Lord Esher MR used the "negotiate and settle the terms of the proposal" whereas Lindley LJ said that: "He was the person deputed by the company to receive the proposal, and to put it into shape." Kay LJ on the other hand said: "It was his duty to get the form of proposal filled up and signed by the proposer, and to see that this was done correctly." However, it is not clear on what evidence the learned Lords Justices came to this finding. The proposal form contained a number of questions, the answers to which were filled in by Quin at the dictation of *Bawden*, and these answers were all correct. It also contained a printed declaration, the material words of which were: "I ... have no physical infirmity, nor are there any circumstances that render me peculiarly liable to accidents ... I agree that the statements contained in this proposal shall form the basis of the contract between me and the company." It also contained a marginal note against this clause: "If not strictly applicable, particulars of any deviation must be given at back." No particulars as to his one-eyed condition were given at back by either Quin or the assured, but *Bawden* signed his name to the proposal, and Quin forwarded it to the company who accepted it. Quin knew, at the time he did so, that *Bawden* had only one eye. The policy was renewed from time to time, and *Bawden* met with an accident which destroyed the sight of the remaining eye. The Court held that Quin's knowledge was the knowledge of the company, who must, therefore, be taken to have contracted with a man who, to their knowledge, was a one-eyed man. The policy insured 500 L "if the direct effect of (the injury by accident) shall, within three calendar months from the occurrence of such injury, occasion ... permanent total disablement," e.g. "irrecoverable loss of sight in both eyes"; and 250 L if it caused complete and irrecoverable loss of sight in one eye. The Court gave the plaintiff 500

L, though it is difficult to see how the accident within three months caused loss of sight in both eyes; the loss of sight in one eye had been caused long before the accident. The Court held that the knowledge of the agent was the knowledge of the company and that the company, therefore, could not rely on the declaration of the assured that he had no physical infirmity, and that this was the basis of the contract.

On the facts, the present appeal can easily be distinguished from *Newsholme* and *Bawden*. In *Newsholme* the insurance agent was told the true facts by *Newsholme* but the insurance agent saw it fit to fill the proposal form incorrectly and which *Newsholme* eventually signed the proposal form. In *Bawden*, the insurance agent knew that *Bawden* was an illiterate, unable to read and write but only able to write his name and had only one eye. At the dictation of *Bawden*, the insurance agent filled the proposal form which did not reveal that *Bawden* was already blind in one eye. In the present appeal, there was evidence that the agent attended an insurance seminar in Singapore in 1988 to polish up his knowledge in the field of insurance particularly in the field of public liability insurance. The agent was quite emphatic when he said:

> Saya ada beritahu pihak menuntut yang polisi itu akan lindungi kebakaran.

Then again, the agent continued in no uncertain terms that "... niat plaintif untuk lindungi dari api."

The manager of the respondent's company under cross-examination testified that:

> Saya tahu jenis kerja yang dilakukan di tempat plaintiff seperti dalam D11. Saya tahu yang welding ada guna gas dan api. Saya tahu kerja-kerja dibuat di tempat plaintif itu. Saya setuju yang tempat kerja plaintif ada risiko kebakaran.

It was with this knowledge that the manager accepted the appellant's form and thereafter issued the cover note. It is my judgment that the agent in the present appeal was the agent of the respondent insurer and any knowledge that the agent possessed was deemed to be the knowledge of the respondent insurer.

Next, it was argued that the indemnity clause in the schedule do not extend to fire. That fire is exempted and if the appellant wanted an indemnity to extend to fire he should have requested for it and by necessary implication would have paid premium on it. This was the stand of the respondent. The question to pose is it. Is it not due to the fault or negligence of the appellant's worker whilst welding the exhaust of Liaw's motorcar that the fire was sparked off due to an accidental leakage of a gasoline gas pipe? The obvious answer would be a resounding "Yes". It appears that there is an ambiguity between the indemnity clause and exception (4) (b) and applying the *contra proferentum* rule as propounded by the then Federal Court in the case of *Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohamed Daud* [1979] 2

MLJ 29, the insurance policy here should be construed in favour of the appellant insured. The then Federal Court in *Malaysia National Insurance Sdn. Bhd. (supra)* pointed out that the general rules of interpretation apply to insurance policies as in any other written document and proceeded to lay down a well trodden principle that:

> ... as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say if there is a doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

Lord Brightman in the Privy Council case of *Kandasami v. Mohamed Mustafa* [1983] 2 MLJ 85 especially at page 88 succinctly said that:

> ... there is a principle of construction that if a document inter partes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

In 1981, Mohamed Azmi J (now FCJ) applied the *contra proferentum* rule in construing an insurance policy in the case of *Central Lorry Service Co. Sdn. Bhd. v. The American Insurance Co.* [1981] 2 MLJ 40. The plaintiffs in that case were the carriers of goods and they transported goods belonging to Nestle's Products (M) Ltd in their lorry No: BAC 7779. On 18 January, 1973 during the currency of the policy issued by the defendants to the plaintiffs to cover loan and damage to goods, an accident occurred to the said lorry while it was conveying the said goods from Kuala Lumpur to Muar. Near Malim in Malacca, the near side wooden flap suddenly gave way and some goods to the value of $14,451.01 were thrown out from the lorry and subsequently stolen by person or persons unknown. The amount claimed was admitted by the defendants subject to liability. The only issue for determination was whether the circumstances under which the goods were lost and damaged were covered by the inland and transport clause of the policy. It was held, *inter alia*, that in construing insurance policies, the *contra proferentum* rule should apply if there was ambiguity or doubt as to the extent of the policy. Since the policy was prepared by the insurance company the doubt and ambiguity should be construed in favour of the insured, the plaintiffs in this case. Mohamed Azmi J (now FCJ) after examining the facts, observed in trenchant terms:

> In my view, there is only doubt and ambiguity in the clause as to whether the policy covers any accident to the vehicle or is merely confined to accidents caused by the vehicle involuntarily leaving the road or by break down of bridges. In construing policies, the contra proferentum rule should apply if there is ambiguity or doubt as to the extent of the policy. Since the policy is prepared by the insurance company, the doubt and ambiguity should be construed in favour of the insured, namely, the plaintiff in this case. In the event, I hold that the policy covers all accidents to the vehicle and that the two events described

> in the clause are mere examples and not exhaustive. The plaintiff's claim is, therefore, covered by the Inland Transport Clause in the policy.

Any damage to property belonging to the third party which arose from the negligence of the appellant as the insured and/or the negligence of the appellant's servant whilst engaged in the workshop must be indemnified by the respondent insurer so said the indemnity clause in the schedule. In construing the type of negligence which the indemnity clause is said to cover one must always bear in mind the type of business the appellant insured was engaged in, namely : selling, fixing and welding exhaust, windscreen and radiator. Since welding an exhaust of a motor vehicle involves some risk of fire, can the negligence as referred to in the indemnity clause as set out in the Schedule thereto extend to fire. The appellant took the stand that it could while the respondent adopted an opposite view. An act is said to be negligent when it is done, not with the desire of producing a particular result, but actually producing that result by carelessness or indifference. An illustration of this mental indifference is seen in the case of *Vaughan v. Menlove* [1837] 3 Bing. NC 468, where the defendant there stacked his hay in such a way as to give rise to the probability of fire. He was warned of the danger, was advised to take the rick down but he said that he would chance it. As a result the rick caught fire, which was due to his negligence and not to the defendant's intention at all that it should occur. Another illustration to the use of the word negligence to describe a state of mind is to be found in the judgment of Lord Denman CJ in *Filliter v. Phippard* [1847] 11 QB 347 357 where his Lordship in dealing with the way in which a fire may be started, said:

> In strictness the word 'accidental' may be employed in contradistinction to 'wilful' and so the same fire might begin both accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance or incapable of being traced to any cause.

In the present appeal before me, we know how the fire had been caused. It was caused by the negligence of the appellant insured's employee when welding the exhaust of Liaw's car. The way the fire was started in the present appeal reflected the carelessness or indifference of the appellant insured's employee. Lord Wright said in *Lochgelly Iron* and *Coal Co. v. M'Mullan* [1934] AC 1, 25:

> In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing.

"Negligence is the failure to use the requisite amount of care required by the law in the case where a duty to use care exists" (per Lord Porter in *Riddell v. Reid* [1943] AC 1, 31).

Now, applying "the complex concept of duty, breach, and damage", the negligence of the appellant insured's employee was the proximate cause of the fire that totally destroyed Liaw's car, the innocent third party. The appellant insured intended to insure his workshop from the hazards of fire and this was known to the agent. If there was an ambiguity as to whether the negligence that was referred to in the indemnity clause must necessarily extend to fire as the appellant insured must have thought then the *contra proferentum* rule must be vigorously applied against the respondent insurer. This, I so hold and it is part and parcel of my judgment.

Reverting back to the issue of agency, I would have thought that the appellant insured in the present appeal must be envious of the appellant in the case of *Chan Woon-Hung (trading as Ocean Plastic Factory) v. Associated Bankers Insurance Co. Ltd.* [1993] 2 HKLR 127 who had an interpretation in Chinese characters of the English language insurance policy on the insurance policy itself. In *Chan Woon-Hung's* case, the Privy Council had to consider the extent to which the fact that the insured is illiterate is relevant to the insured's position as far as the contract of insurance was concerned. The brief facts of *Chan Woon-Hung's* case were that the appellant there was a Chinese resident in Hong Kong. He spoke no English and was a proprietor of a small plastic factory. In July 1990, he effected a policy of employer's liability insurance with the respondent, and subsequent thereto he renewed the policy annually for a number of years and received on each occasion a new policy with the same conditions. Each policy was written in the English language and entitled "Employees' Compensation Policy". Immediately above these words were words written in Chinese characters which provided a similar description. The policies contained ten conditions, and underneath there was a box which contained the following words in the English language:

> For your own protection, you are requested to read the policy and its conditions in order to ascertain that it is in accordance with your intentions and, if it is incorrect, return it immediately for alteration.

Now, within that box and immediately below the English words as set out above, were Chinese characters which spelled out a similar message. Each policy had a note written in Chinese characters headed: "Procedure for handling employee's compensation claim."

An accident occurred on 10 October 1983, where an employee of the appellant sustained an injury to his right hand while operating a pressing machine. The appellant quickly sent to the respondent's agents a notice of the accident and dutifully complied with all the other procedural requirements in the Chinese note. But unfortunately the appellant failed to inform either the agents or the respondent of his subsequent plea of guilty to the statutory offence of failing to provide an effective guard for dangerous machinery. The respondent took steps to repudiate the contract for non-disclosure and subsequently they did just that. An argument was advanced by the appellant to the effect that the

respondent, knowing that the appellant did not understand the English language had, by attaching the note in Chinese characters to the policy, misled him into thinking that it contained exhaustive instructions as to what he must do in the event of a claim by an employee. Their Lordships of the Privy Council were of the view that the fact that the appellant had in his possession for a prolonged period (three years to be exact) all the contract documents at his disposal and that he could at any time have obtained a translation was said to negative any disability from which he suffered by his lack of understanding of the English language and, accordingly, judgment was given to the respondent. Their Lordships of the Privy Council were also of the view that it must always be a question of circumstances as to what extent, if at all, ignorance of the language of a contract is relevant to the position of one of the parties to the insurance contract.

In the present appeal before me, hardly three months (to be exact 2 months 23 days) after the appellant insured his workshop the accidental damage to Liaw's car occurred at the workshop. Can I apply *Chan Woon-Hung's* case and rule that the appellant could reasonably obtain a translation of the English policy within that short period of hardly three months even though the agent knew that the appellant wanted to insure his workshop from the hazards of fire. On the facts, the present appeal are poles apart from *Chan Woon-Hung's* case. One sharp dissimilarity is that in the present appeal there is no note in Chinese characters written in the insurance policy for the benefit of the appellant insured - a Chinese by race. Lest, I be accused of an oversight, I am mindful that Malaysian Judges have dearly and rigidly held onto the rule, somewhat steadfast, that once a person signs a proposal form he is bound by its contents (*United Malayan Insurance Co. Ltd. v. Lee Yoon Heng* [1964] MLJ 453; *Wong Lang Hung v. National Employees' Mutual General Insurance Association Ltd.* [1972] 2 MLJ 191; *China Insurance Co. Ltd. v. Ngan Ah Kau* [1972] 1 MLJ 52; *Tan Kang Hwa v. Safety Insurance Co.* [1973] 1 MLJ 6; *National Insurance Co. Ltd. v. S. Joseph* [1973] 2 MLJ 196 and *Ong Eng Chai v. China Insurance Co. Ltd.* [1974] 1 MLJ 82). This seems to be the position in Malaysia notwithstanding the situation where the proposal was in the English language and the insured could neither read, write nor understand the language *(United Malayan Insurance Co. Ltd. v. Lee Yoon Heng (supra))*. In England, English Judges are more sympathetic towards the insured as can be seen in the decision of the *Bawden's* case. In my view, one of the factors that justified the decision in the *Bawden's* case was the fact that the insured in that case was a one-eyed man. The Court of Appeal in the *Bawden's* case took into account the surrounding circumstances so as to put a special meaning to the words used in the contract of insurance. In the *Bawden's* case, the surrounding circumtances were that, for fear of repetition, the proposal was negotiated and settled by the agent with a one-eyed man. Thus, in a situation where the proposer or insured is blind or illiterate, the agent can be said to have implied or ostensible authority to fill up the proposal form.

Section 18E of the Insurance Act, 1963 which was introduced by Amending Act 294 w.e.f. 1 June 1975 watered down the *Newsholme* situation to a little extent.

That section reads as follows:

> 18E (1) Where any agent or servant of an insurer writes or fills in any particulars in a proposal for a home-service policy with the insurer, then, notwithstanding any agreement to the contrary between the proposer and the insurer, any policy issued in pursuance of the proposal shall not be avoided by reason only of any incorrect or untrue statement contained in any such particulars so written or filled in unless the incorrect or untrue statement was in fact made by the proposer to the agent or servant for the purposes of the proposal.
>
> (2) The burden of proving that any such statement was so made shall lie upon the insurer.
>
> (3) Nothing in this section shall be deemed to allow the avoidance of any policy for any reason or in any circumstances for or in which the policy could not have been avoided apart from the provisions of this section.

Now, s. 18E of the Insurance Act, 1963 relates and is confined to agents filling in proposal forms for a home-service policy. The First Schedule to the Insurance Act, 1963 defines a home-service policy as "a life policy in respect of which premiums are contracted to be paid at intervals of less than two months and are or have been ordinarily collected in the course of door-to-door collections made by persons employed for the purpose, but shall not include in relation to any insurer any description of policy which the Director-General directs is not to be treated as a home-service policy." Another apparent laxity in s. 18E of the Insurance Act, 1963 relates to the possible line of argument by the insurer to the effect that the agent has no authority to fill in the proposal form on behalf of the insurer. With these shortcomings, it is not surprising that by an Amending Act 432 that came into effect on 1 April 1978, s. 44A to the Insurance Act, 1963 was enacted. That section reads as follows:

> 44A (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.
>
> (2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of s. 16A or any other provision of this Act by such person.

(3) This section shall not apply:

(a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or

(b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

At first glance, one is certainly impressed with the provisions of s. 44A of the Insurance Act, 1963. It is worded better and wider than s. 18E, and the pertinent differences can be categorised in this way:

(i) Section 18E speaks of "an agent or servant of the insurer" whereas s. 44A mentions "any person who has at any time been authorized as its agent by an insurer" and such person is deemed to be the agent of the insurer for the purpose of the formation of the contract.

(ii) Section 18E is confined to a home-service policy whereas s. 44A applies to all types of insurance policies.

(iii) Section 18E talks of an agent filling in the proposal form whereas s. 44A is couched in wider terms in that it speaks of an "agent ... who solicits or negotiates a contract of insurance ... ." It appears s. 44A would throw the net wider; it would envisage the situation where the authorised agent solicits or negotiates and then extend to the point of time when the authorised agent fills up the proposal form. The whole rigmarole before filling up the proposal form would be considered and should be considered under s. 44A.

(iv) *Newsholme* lays down the proposition that the agent who helps the insured to fill up the proposal form is not the agent of the insurer, instead the agent assumes the capacity of an agent for the insured. Section 44A, on the other hand, deems the knowledge of the agent to be that of the insurer and it covers matters like the agent's knowledge of material facts as well as those other facts made relevant for the formation of the contract.

(v) By virtue of s. 44A (2), the insurers will have to monitor their agents closely.

From the available evidence, I hold that by virtue of s. 44A of the Insurance Act, 1963 the agent in the present appeal was an authorised agent of the respondent insurer and whatever knowledge the authorised agent had on the workshop together with the knowledge that the appellant insured was not conversant in the English language must be deemed to be the knowledge of the respondent insurer. Flowing from this, it is my judgment that there was a valid and binding contract of insurance between the appellant insured and the respondent insurer and, consequently, I hold, and, it is my judgment that the appellant insured should succeed in this appeal. It is obvious that the learned

Magistrate failed to adequately take into account that the agent was an authorised agent of the respondent insurer and whatever knowledge the authorised agent had must be deemed to be the knowledge of the respondent insurer by reference to s. 44A of the Insurance Act, 1963. Perhaps this oversight by the learned Magistrate can be explained in that before him, s. 44A of the Insurance Act, 1963 was not adverted to at all. In fact, before me no arguments were advanced on ss. 18E and 44A of the Insurance Act, 1963. Be that as it may, in construing s. 44A of the Insurance Act, 1963, I am prepared to hold that an authorised agent of the insurer who solicits or negotiates a contract of insurance in such capacity for the formation of the contract must be given a wide scope of jurisdiction so as to cover not only explicit and expressed authority but also apparent or ostensible authority. Thus, if the insured allows an authorised agent to fill the proposal form for him, and the insured gives the correct answers but the answers were falsely written down by the authorised agent for reasons best known to him, then the authorised agent remains throughout as the authorised agent of the insurer. This interpretation is in accord with the accepted canon of construction that a commercial document, like an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that the provisions of the insurance policy receive a fair and sensible application: *Hydarnes v. Indemnity Mutual* [1895] 1 QB 500, 504. But if the insured allows or requests the authorised agent to fill the proposal form for him and gives permission, whether oral or in writing, to the authorised agent to cough up with the answers to not only some but all the questions in the proposal form, the insured shall be deemed to have acquiesced in the falsification of the answers if he signs the proposal form. This is then said to be collusion or connivance between the authorised agent and the insured as envisaged in s. 44A (3) (a) of the Insurance Act, 1963. For these reasons, the first issue will have to be decided in favour of the appellant insured in that his loss was not excluded by the exception clause in the insurance policy.

The second issue

There was an arbitration clause in the insurance policy. The respondent insurer raised the arbitration clause in their statement of defence and, before me, it was contended that since the subject matter was not referred to arbitration the appellant insured was said to be without a valid cause of action. When both parties appeared before the learned Magistrate on 2 December 1989, the statement of defence was filed and the Court then proceeded to fix the date for hearing on 14 April 1990. Section 6 of the Arbitration Act, 1952 allows any party to the legal proceedings to apply to the Court to stay the proceedings pending reference to arbitration. It must be emphasised that the power to stay under s. 6 of the Arbitration Act, 1952 is discretionary in nature and that discretion must be exercised fairly and judiciously (*Willesford v. Watson* [1873] 7 LR 473 and *Thiagarajah Pooinpatarasan v. Shanmugam Paramsothey and Others* [1990] 2 CLJ 312). From the authorities, certain conditions must

be fulfilled before the Court could exercise its discretionary power to order a stay of legal proceedings pending arbitration and these conditions may be itemised and summarised in this way:

(1) a valid and binding arbitration agreement must subsist between the parties;

(2) the proceedings which the parties contemplated must have commenced in the Courts;

(3) these proceedings must necessarily be instituted by one of the parties to the arbitration agreement or for that matter by any person claiming under that arbitration agreement;

(4) the proceedings must relate to and connect with those matters which have been agreed to be arbitrated upon by the parties;

(5) the party affected by the arbitration clause and who is a party to the legal proceedings must apply for a stay pending reference to arbitration;

(6) such an application for a stay has to be made before filing the cause of action in Court or before taking any step towards commencing the legal proceedings (*Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd.* [1991] 3 MLJ 475; *Ives and Barker v. Williams* [1894] 2 Ch. 478);

(7) the applicant is ever ready and willing in all situations to do all things considered necessary to despatch the proper conduct of the arbitration (*Amanah Saham Pahang Bhd. v. Maran Road Sawmill Sdn. Bhd. & 5 Ors.* [1984] 1 CLJ 242); and

(8) there is no sufficient reason shown as to why the matter should not be referred to arbitration in accordance with the arbitration agreement *(Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.* [1991] 3 MLJ 309).

From the record of proceedings neither the appellant insured nor the respondent insurer applied under s. 6 of the Arbitration Act, 1952 to stay the legal proceedings that was filed before the learned Magistrate pending reference to arbitration. I am sure had there been an application for a stay, the Court would readily grant that stay pending arbitration as reflected in the *"Dong Moon" Trans Asia Shipping Co. Ltd. v. "Dong Moon" downers & Ors.* [1979] 1 MLJ 152. Of course, one must remember that it is always upon the person opposing the stay to give sufficient grounds why the dispute should not be referred to arbitration (*Allagappa Chettiar v. Palanivel Pillai & Ors.* [1967] 1 MLJ 209). Raja Azlan Shah J (as His Majesty then was) put it nicely in the case of *Lan You Timber Co. v. United General Insurance Co., Ltd.* [1968] 1 MLJ 181 to this effect:

> Under s. 5 of the Arbitration Ordinance (in substance the same as s. 4 of the English Arbitration Act, 1889) the Court must hold the parties to their contract, provided they submit to arbitration, unless some sufficient reason, adequate in the circumstances, justified its setting aside the terms of the contract and then

exercising a discretion in favour of allowing the action to proceed. The onus is on the person opposing the stay, in this case the plaintiffs, and they had not shown sufficient reasons why it should not be referred to arbitration.

Abdul Hamid J (who later became the Lord President) in *Government Officers Cooperative Housing Society Ltd. v. United Asia Investment Ltd. & Ors.* [1972] 1 MLJ 113 adopted the correct view when his Lordship said that the Court is vested with the power to stay proceedings pending arbitration. His Lordship expressed in cogent terms the following (at page 114 right hand column at G):

> The Court is invested with the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration provided the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

At page 115 of the same case, his Lordship Abdul Hamid J (who later became the Lord President) said:

> I am conscious that in law the decision lies with the discretion of the Court. However, this discretion must be founded upon judicial principles. (See *Barnes v. Youngs* [1898] 1 Ch. 414 at page 418 (per Romer J); *Green v. Howell* [1910] 1 Ch. 495 at page 511 (per Buckley LJ). It is for the Court to consider whether the questions at issue are such as would be better decided by the Court than by an arbitrator. In doing so the Court will have regard to all the circumstances of the particular case. (See *Bristol Corporation v. John Aird & Co.* [1913] AC 214).
>
> As between the plaintiff and the first defendant, I am inclined to think that the arbitrator has jurisdiction to make an award if accounting and other differences arising directly under the agreement are the only matters in issue. That does not seem to be the case here. The matters in issue in the present case may involve not only a decision as to whether the first defendant company was a trustee of the plaintiff but also a question of fraud. Moreover the plaintiff is also claiming against two other defendants, and the deponent/third defendant, evidently, is not only a director and shareholder of the first defendant company but also of the second defendant company. If, as alleged by the plaintiff, the monies held by the first defendant company were indeed held in trust for the plaintiff and that a fraud or an act in the nature of fraud was perpetrated with intent to benefit the third defendant, then clearly by reason of the third defendant's position in these companies, the questions of accounting, breaches of trust and fraud become quite inseparable. Should the matter be submitted to arbitration in accordance with the provisions of the agreement and an award be made against the first defendant company then clearly such award cannot be binding upon and enforced against the second and third defendants. Thus insofar as the plaintiff's claim against the second and third defendants, the matter will still have to be decided by the Court.

In another paragraph of the same page in the same case, his Lordship Abdul Hamid J (who later became the Lord President) continued:

> Having regard to the circumstances of this particular case and in the light of the pleadings and the affidavits before this Court, I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the first defendant company, a matter which it would seem to me to be outside the arbitrator's power to decide. In my view this is not the type of dispute that should be properly referred to an arbitrator. In other words I am satisfied that good grounds exist why this particular dispute should not be submitted to an arbitrator. I therefore refuse the application to stay proceedings to refer to arbritation.

In 1988 in the case of *Lai Siew Wah Sdn. Bhd. v. Ng Chin* [1988] 1 MLJ 393, Wan Suleiman SCJ (as he then was) speaking for the Supreme Court refused an application for a stay pending arbitration when there was a *bona fide* allegation of fraud. This was what his Lordship said:

> The respondent had relied on *Radford v. Hair and Others* [1971] 2 All ER 1089 and *Malaysia Government Officers' Co-operative Society Ltd. v. United Asia Investment Ltd. & Ors.* [1972] 1 MLJ 113 as authorities for the proposition that once the Court is satisfied that one of the substantial matters at issue is an allegation of fraud on the part of a party (in the latter case, of the defendant), it could refuse an application by such a party for stay of proceedings.

Now, applying the above mentioned authorities to the facts of the present appeal, it is my judgment that the issue of agency and the implications of s. 44A of the Insurance Act, 1963 are matters outside the purview of the arbitrators. These are matters that should best be resolved by the Courts and not the arbitrators and, consequently, I am impelled to conclude that good grounds exist not to submit the dispute between the parties to arbitration and notwithstanding the arbitration clause in the insurance policy, the appellant insured was entitled to institute his action in the Magistrate's Court, Johor Bahru. In the event, this issue falls to be decided in favour of the appellant insured.

For the reasons adumbrated above, I had no choice but to allow the appeal with costs. Consequently, I ordered that the appellant insured was entitled to the sum of RM9,000 which he had paid to Liaw and which sum represented the damage to the motorcar. The adjusters report at RM234 together with the police report at RM10 were ordered to be paid to the appellant insured. Lastly, an interest at 8% per annum from 6 March 1989 to the date of payment or realisation was also ordered.

Reported by Cindy Chan